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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-839

ROBERT P. WHALEN, as Commissioner of Health of the State of New York,

Appellant,

against

RICHARD ROE, an infant by ROBERT ROE, his parent; JOHN DOE, an infant by MARY DOE, his parent, JAMES MOE, an infant by MICHAEL MOE, his parent; JANE POE, MATTHEW T. BRODY, ISRAEL L. SCHMIERER AND EMPIRE STATE PHYSICIANS GUILD, INC.,

Appellees,

and

GEORGE PATIENT, MARTHA PATIENT, GERALD L. LUSTIG, and THE AMERICAN FEDERATION OF PHYSICIANS AND DENTISTS,

Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellant
Office & P. O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-3396

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

A. SETH GREENWALD
Assistant Attorney General
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75

ROBERT P. WHALEN, as Commissioner of Health of the State of New York,

Appellant,

against

RICHARD ROE, an infant by ROBERT ROE, his parent; JOHN DOE, an infant by MARY DOE, his parent, JAMES MOE, an infant by MICHAEL MOE, his parent; JANE POE, MATTHEW T. BRODY, ISRAEL L. SCHMIERER AND EMPIRE STATE PHYSICIANS GUILD, INC.,

Appellees,

and

GEORGE PATIENT, MARTHA PATIENT, GERALD L. LUSTIG, and THE AMERICAN FEDERATION OF PHYSICIANS AND DENTISTS,

Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant appeals from a final judgment of the United States District Court for the Southern District of New York entered on October 9, 1975, which declared uncon-

stitutional New York Public Health Law §§ 3331(6), 3332 (2)(a), and 3333(4), insofar as they required the filing of official New York State prescriptions containing patient identity with the appellant and further enjoined the enforcement of the statutes. This statement is submitted pursuant to Rule 15 of the Rules of the Supreme Court of the United States.

Opinions Below

The opinion of the District Court originally denying the application to convene a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 and dismissing the complaint is reported below at 357 F. Supp. 1217.

The opinion of the Court of Appeals for the Second Circuit reversing the order of the District Court and remanding for the convening of a three-judge court is reported below at 480 F. 2d 102.

The opinion and order of the three-judge court denying a preliminary injunction to plaintiffs and also denying a motion to dismiss to defendant is reported below at 364 F. Supp. 536.

The opinion of the three-judge court decalaring the statutes involved unconstitutional and granting to plaintiffs a final injunction is not yet reported. It is reproduced herein as Appendix "A" (1a).

Jurisdiction

These consolidated actions were brought pursuant to 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983, to declare unconstitutional and enjoin the operation of New York's Public Health Law Art. 33 (§§ 3300 *et seq.*) as required the use of official New York State prescriptions for the prescribing and dispensing of Schedule II drugs; specifically §§ 3331

(6), 3332(2)(a) and 3333(4), as to patient identity. The final judgment of the District Court was entered October 9, 1975. The defendant filed his notice of appeal on October 20, 1975. Copies of the judgment and notice of appeal are reproduced herein as Appendices "B" (14a) and "C" (18a).

The jurisdiction of the Supreme Court to review the decision and judgment herein is conferred by 28 U.S.C. §§ 1253 and 2101(b).

Statute Involved

New York Public Health Law (P.H.L.) §§ 3331(6), 3332(2)(a), and 3333(4). These provisions require filing of the official prescriptions which by 3332(2)(a) contain a patient's name and address.

There are:

P.H.L. § 3331 (6):*

> "6. A practitioner dispensing a substance which may be prescribed only upon an official New York state prescription must at the time of such dispensing prepare an official New York state prescription in the manner set forth in subdivision two of section thirty-three hundred thirty-two of this article. The practitioner shall retain one copy for five years and shall file the original and one copy with the department by not later than the fifteenth day of the next month following the month in which the substance was delivered. This requirement shall not apply to the dispensing by a practitioner pursuant to section thirty-three hundred fifty-two of this article."

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* Actually only P.H.L. § 3332(2)(a) refers to the contents of the triplicate prescription, which is upheld but without patient identity on the filed copies.

P.H.L. § 3332 (2) (a):*

"2. Such prescription shall be prepared in triplicate, writen with ink, indelible pencil or, apart from the practitioner's signature, typewriter. The original and both copies must contain the following:

(a) the name, address and age of the ultimate user for whom the substance is intended, or, if the ultimate user is an animal, the species of such animal and the name and address of the owner or person in custody of such animal;"

P.H.L. § 3333 (4):*

"4. The endorsed original prescription shall be retained by the proprietor of the pharmacy for a period of five years. The endorsed copy of such prescription shall be filed with the department by not later than the fifteenth day of the next month following the month in which the substance was delivered."

Other portions of Article 33 of the New York Public Health Law are possibly involved and are set forth in appendix "D". (20a)

Questions Presented

1. Was the District Court correct in concluding that New York did not need patient identity on filed prescriptions to achieve a legitimate state purpose?

2. Did the filing requirement invade any constitutionally protected right of privacy of the plaintiffs?

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* Actually only P.H.L. § 3332(2)(a) refers to the contents of the triplicate prescription, which is upheld but without patient identity on the filed copies.

3. Did the plaintiffs have standing or present a real case in face of the strict confidentiality provisions in the law?

(a) Can unsubstantiated "fears" support an actual case or controversy?

4. Is it proper to test the constitutionality of the filing statute in question by a "compelling state interest" requirement?

Statement of the Case

There are two actions for declaratory and injunctive relief brought pursuant to the Civil Rights Law to invalidate a state statute, which requires that all prescriptions for Schedule II drugs, P.H.L. § 3306 (Schedule II) be prescribed and dispensed on official New York State prescriptions, with one copy thereof to be filed with the defendant and his Department of Health. The complaints sought to invalidate P.H.L. §§ 3331(6), 3332(2)(a), and 3333(4)*, as to any requirement that disclosed patient identity to the State.

Thus, plaintiffs Richard Roe (a fictitious name) *et al.* (hereinafter called "Roe") commenced the action in the United States District Court for the Southern District of New York against the defendant (appellant) for a judgment, as noted. The complaint centered on the use of official state prescription forms. The action was filed on March 29, 1973 via an order to show cause. Plaintiffs George Patient et al. (hereinafter called "Patient") commenced a similar action, attacking the same statute. That complaint was filed April 3, 1973.

Roe by order to show cause, signed March 29, 1973, moved for the convening of a three-judge court and for a

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* The Patient plaintiffs intervened; 357 F. Supp., at 1219, ftn. 5.

preliminary injunction. A temporary stay of administrative implementation of the law, in part, was granted. On the return date, April 6, 1973, Patient was allowed to intervene, but the complaint was dismissed as raising no substantial constitutional issue. (357 F. Supp. 1217). The stay of full implementation was dissolved.

Roe and Patient took an appeal to the Court of Appeals for the Second Circuit. The stay of implementation, in part, was reinstated pending appeal by the Circuit. The State could not process prescription forms received. The Court of Appeals reversed the dismissal of the complaint and remanded the action to the District Court for the convening of a three-judge court. The stay, or temporary restraining order, as modified, was continued pending the hearing before the District Court (480 F. 2d 102).

On remand, the statutory District Court denied both Roe and Patients' motions for a preliminary injunction and the state's motions to dismiss.* (364 F. Supp. 536).

The State filed an answer and extensive discovery thereinafter ensued. A trial was held on December 2, 1974 before the Court. Evidence was also received by way of (1) stipulated facts, (2) depositions taken on December 4 and 6, 1974 and (3) exhibits. The District Court filed its unanimous opinion on August 13, 1975 (App. A). The opinion held "that so much of the New York [Public] Health Law as requires reporting to state authorities in Albany the names and addresses of patients who receive Schedule II drugs as medication by duly licensed physicians is an unconstitutional interference with plaintiffs' rights of privacy guaranteed under the Fourteenth Amendment." (13a).

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* The filing statute did not go into full force and effect until the Court of Appeals vacated preliminary injunctions in two similar actions on September 11, 1973, *New York State Physicians Union* v. *Ingraham* (W.D.N.Y., Civil 1973-248, Civil 1973-281). We are aware of no further proceedings therein.

On October 9, 1975, the District Court signed an order which contained a stay suggested by the Roe attorneys. The order (1) declared unconstitutional Public Health Law (N.Y. §§ 3331[6], 3332[2][a] and 3333[4]) as they require disclosure of patient identity; (2) enjoined defendant from enforcing the above provisions and accepting such prescriptions or any other document disclosing patient identity for filing; and applied this to any other agency of the State (although appellant has no control over them and none were parties); (3) required defendant to destroy all records within 60 days; and (4) file an affidavit to that effect.

The District Court stayed (3) and (4) pending defendant filing an appeal. However, appellant had to place all computer tapes and forms in a sealed vault and he could no longer add names to or make any record from the tapes of patient names. As a consequence patient identity from prescriptions is no longer available to the state via the statute.

The appellant then applied to Mr. Justice Thurgood Marshall, Circuit Justice, for a stay of judgment. After hearing argument, Justice Marshall denied the stay in an opinion dated October 28, 1975 (Appendix "E" herein, 39a).

Facts of the Case

The plaintiffs-appellees in both actions are anonymous patients and named doctors and doctor's organizations. The suits were started on the eve of the effective date of Article 33 of the Public Health Law. The challenged portions of the statute required that on or after April 1, 1973, a practitioner (physicians and others) would have to use an official New York state prescription for prescribing Schedule II drugs, a limited list of narcotic and like substances. Pharmacists could only sell such drugs on the official prescriptions, with exception for emergencies (P.H.L. § 3334).

The official prescription is dispensed in triplicate and only on special order to practitioners. It is required to have certain specified information (P.H.L. § 3332) including patient's name, address and age (§ 3332[2][a]). After the drug is dispensed the pharmacist must file a copy with the Department of Health (3333[4]), or if the practitioner self-dispenses, he must file a copy in similar manner (3331 [6]).

The purpose of the filing requirement is found in the legislative history. As stated in the Interim Report of the Temporary State Commission to Evaluate the Drug Laws (N.Y.S. Legislative Documents [T.S.C] [1972] No. 10) at p. 21:

> "Once the department has received the copies, it will be able to compile data which will uncover irregularities such as forgeries, fraudulent obtaining of schedule II substances, and thefts of prescription blanks and their misuse by unauthorized persons. The information received by the department will show if a patient has obtained prescriptions by going from doctor to doctor, or if stolen prescriptions are being used. This procedure will also indicate where there has been an over-prescribing or over-dispensing of schedule II drugs. There is a 30-day maximum on the amount of any controlled substances which may be dispensed. Prescriptions for schedule II substances may not be refilled (§ 3339)."

There was no pretense or expectation that multiple prescription and monitoring would solve all problems of drug abuse. Thus at p. 22 of the Interim Report:

> "The Commission has no illusion that the multiple prescription requirement and monitoring of the prescriptions by the departemnt will affect the far more significant problem of street abuse, particularly of the contraband drugs. We do believe, however, that it will be a significant step in reversing the growing trend of diversion and of 'legitimate' abuse of dangerous drugs."

The expectation was that upon filing the data (including patient identity) from the prescription it would be encoded. This via modern data processing techniques (computers). See Second Interim Report of the T.S.C. April 5, 1971, which reviewed the possible uses of triplicate prescriptions. Also cited were the operation of similar systems for varying periods in California, Idaho and Illinois.* Noted was their experience and the conviction that "such a program in New York will result in a marked decrease in the abuse of legitimately prescribed drugs" (p. 21). In other words, triplicate prescriptions and filing can have a prophylactic affect in this area.

As noted in the opinion of the Court, the Schedule II drugs, while of some accepted or restricted medical use, also have a high potential for abuse. The monitoring of these drugs by the use of triplicate prescriptions seeks to prevent these drugs from being diverted to illegal uses.

The plaintiffs patients objecting to the filing of their names on the filed prescriptions, contended the statute was an invasion of their constitutional right of privacy. The doctors contended that the filing interfered with their constitutional right to practice their profession and prescribe medication or drugs as they saw fit. As such, it was claimed the law infringed on the confidentiality of the doctor-patient relationship.

Basically the plaintiff envisioned that the data collected would be misused, *i.e.*, that they would be labelled "drug addicts", the data would not remain confidential, and the

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* California Health & Safety Code §§ 11158, 11160, 11167; Idaho Code, §§ 37-2722, 37-2730, Ill. S.H. Ann., Ch. 56½, §§ 1308, 1311, 1312(a).

like. The actions were begun on or before the complete effective date of the filing requirement, as complete filing and computerization of the prescriptions was delayed until September, 1973 due to various court orders. Thus the above proposition was a complete supposition.

There was a trial and the testimony of the plaintiffs' witnesses is summarized (5-6a) the actual operation of the triplicate was only described by the opinion (11a) to include the use of patient identity, in printing out lists of patients obtaining more than a 30-day supply of Schedule II drugs or going from doctor to doctor to obtain Schedule II drugs.* Actually other uses were testified to (specific inquiries from the field). Even in the specific area, the cited single instance (11a) has been joined in the months following trial by dozens of suspect situations revealed by increased scrutiny of printouts. Obviously this could not be reflected in the record. Of course if filing totally met the Legislature's hopes, no one would violate the law and no suspect situation would exist.

Based on this supposed lack of *results,* the Court below concluded that the State did not *need* patient identity on the filed prescriptions and enjoined the filing or processing of prescription forms containing patient identity.** The order signed prevented permanently any use of patient identity to better enforce Article 33 of the P.H.L. A limited stay allowed the defendant to keep previously processed prescriptions but not make any use of them.

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* No plaintiff patient testified he would be on the print-out, nor did any doctor testify he would be on the print-out.

** The opinion held it was "unnecessary" to evaluate confidentiality requirements (13a).

The Questions Presented on This Appeal Are Substantial

1. There is serious doubt whether the plaintiffs had standing to sue or presented a real case or controversy

In the opinion of the District Court it was necessary to assume that a undifferentiated "fear" of computerization gave standing to the plaintiff patients to challenge not just computerization but the filing of the triplicate prescriptions themselves. Thus it was stated (10a):

> "When these physical illnesses and disabilities require as here treatment by drugs which, in light of the current epidemic of drug abuse in the society, are under governmental control and regulation, there is legitimate concern that information that one, one's children or an intimate is under treatment with such drugs not be broadcast to unauthorized sources. There is fear that the adults or children will be stigmatized if their use of the drug becomes known. There is no question but that the statutory requirement challenged here intrudes upon and interferes with the doctor-patient relationship."

Yet there was absolutely no testimony at trial that the information would or could be "broadcast to unauthorized sources" (§ 3371 prohibits unauthorized disclosure). The opinion could only state the "fear" of stigmatization. On the other hand the state effort to control drug abuse and prevent illicit trafficking in dangerous drugs was and is a legitimate state purpose. Despite this the Court concluded that the statute intruded on the doctor-patient relationship and had a needlessly broad sweep. In this regard it had to use the "compelling state interest" test, and expanded it beyond the decisions of this Court. Courts are not to apply the fundamental-interest analysis lightly. *San*

Antonio Ind. School District v. *Rodriguez,* 411 U.S. 1, 18, 44 (1973).

Ignored in the opinion is the fact that the law protects confidentiality by limiting strictly the information, as well as the possble uses of that information; P.H.L. § 3371. This negates any invasion of privacy. The decision also ignored the plain legal facts of the original decision. To quote, 357 F. Supp. 1217, at 1221:

> "First, this is not a case where the state has launched a broad scale invasion into the doctor-patient relationship requiring the publication of the entire medical history and treatment record. Indeed, contrary to plaintiffs' suggestion, even the illness for which the Schedule II drug is prescribed need not be revealed.
>
> "Second, the statute *on its face* does not permit unrestricted divulgence of even the limited information collected. In fact § 3371 confines disclosure to the extent consistent with the purposes of the Act. I have also been presented with the memorandum of Assemblyman Hardt and the affidavit of Commissioner Whalen, both of whom appear to be taking all necessary steps to maintain the security of the computerized information.
>
> "Finally, this is not a case where the plaintiffs have been able to prove actual abuse of the reporting and computerizing process and consequently to argue facial unconstitutionality based upon pragmatic or historical evidence; that is that such process necessarily and inevitably results in abuse." (emph. suppl.)

Plaintiffs' testimony at trial clearly showed they simply were ignorant of the law's confidentiality provisions (P.H.L. § 3371); and of the five year limitation on records; or the State had ever "broadcast" their records, in any

manner. There can be no doubt that the plaintiffs were not failing to receive medication due to the statute or any of defendant's action. Clearly the statute infringed no "fundamental interest" of plaintiffs.

The plaintiffs were ignorant of the fact that defendant always had access to their prescriptions, even before the passage of the statute involved. Once again the Court ignored this obvious point which negates any impermissible invasion of a constitutionality-protected right by reason of this statute. The failure to advert to this is anomalous in view of its recognition in the earlier opinion in this case in which the single district judge said in dismissing the complaint (357 F. Supp. 1217, at 1221-1222):

> "In order to further appreciate the essence of plaintiffs' privacy argument, it is necessary to consider the status of the law prior to April 1, 1973. Insofar as the issues involved in this lawsuit are concerned, the only effective distinction is that the new statute requires sending a copy of each prescription for Schedule II drugs to Albany to be computerized. Previously prescriptions required the name of the patient, N.Y. Public Health Law § 3301(32) (McKinney 1971) (repealed 1973), the pharmacist was required to keep a copy of the prescription, *Id.* at § 3322, and law enforcement officials had complete access to the druggists prescription files, *Id.* at §§ 3322(1) (c), 3334. In short, the state had the power to learn all that it may now require to be revealed. The only difference is that now the state has developed the means to *make effective use* of that basic power which remains unchallenged." (Emphasis supplied)

It was only by ignoring these obvious points that the three-judge court could conclude the plaintiffs had a real case. It even had to ignore its own prior decision, 364 F. Supp. 536, finding "no evidence of any immediate in-

jury", id. at 546, see also 545. The plain fact was that after some 15 months of computerization, at time of trial (Deecmber, 1974),* no plaintiff or anyone else, could show any injury from filing or computerization.

On the other hand, this appeal raises a serious issue as to the control of drug abuse, a fact of life to thousands of people, many of them the recipients of Schedule II drugs, obstensibly for medical purposes. This was a strong factor in the three-judge court originally allowing computerization to go forward. 364 F. Supp. at 546:

> "It should be noted, however, that the state's efforts are directed against a very real and pressing emergency requiring immediate and effective response."

The decision however ignored this emergency and plaintiffs' baseless fears were given the force of law. To condemn computerization because of its efficiency strikes at many vital governmental functions.

It has been held that such "fear", does not support a case of action. *Laird* v. *Tatum,* 408 U.S. 1, 13-14 (1972). What makes this an even stronger case than *Laird,* is the fact the filing and computerization herein is authorized and controlled by a specific statute, directed to a specific and real problem. This is not a case of bureaucrats administratively setting up a computer data-bank. Rather the Legislature saw the need for this compilation and passed specific legislation after much study. (See Interm Reports of Temporary State Commission to Evaluate the Drugs Laws).

The "danger" to plaintiffs was and is hypothetical, based on unsupported assertions that the clear provisions

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* This, contrary to the decision (11a) statement of a 20 month life. Earlier stays delayed computerization. Further the computer was not fully operational for many months, since testing was necessary.

of the very law they are challenging would not be observed —as to confidentiality and length of record keeping.

The decision ignored the testimony that other public officials such as school nurses had records of children taking ritalin, a Schedule II drug. (This drug apparently reduces hyperkenesis, but also has serious side effects).

Remote claims of risk of disclosure do not support a cause of action. *California Bankers Ass'n* v. *Schultz,* 416 U.S. 21, 56-57 (1973). This case upheld a federal bank record-keeping and reporting statute against constitutional challenge.

While standing has been expanded by this Court, it is the law that pleadings (and proof) "must be something more than an ingenious academic exercise in the conceivable." *United States* v. *SCRAP,* 412 U.S. 669, 688 (1973).

> "A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can *imagine* circumstances in which he could be affected by the agency's action. And it is equally clear that the allegations must be true and capable of proof at trial." (Emphasis supplied)

The "proof" in the instant case was that the plaintiffs "imagined" harm and took action on such "visions." Yet with one or two exceptions all received their medication, negating interference with medical practice. Any refusal to accept medication was based on a self-fulfilling prophecy that at some time in the future the data on prescriptions would be misused. Such absurd reasoning cannot support a case. Courts do not engage in vacuous speculation that public officials may not observe statutes or regulations as to confidentiality. *Sanders* v. *Wyman,* 464 F. 2d 488, 491, ftn. 3 (2d Cir. 1972), *cert. denied* 409 U.S. 1128. Even "fears" as to others do not give standing. *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 166 (1972).

Certainly *California Bankers Ass'n, supra,* at 68-69, gives no support to conjectural pleading and proof which is all the instant case contains.*

The District Court struck down an important part of a legitimate state statute on the basis that anonymous patients *might* be harmed by filing if the state did not observe the statute (P.H.L. § 3371) on confidentiality. Also ignored was the five year limitation on keeping of records. (P.H.L. § 3370[3]) which obviously showed no one was branded for life or a child, years later, could have his prescription records revealed.

The assumption of standing by the court below, 364 F. Supp. at 340, ftn. 6, is questionable. The claims herein were premature and still are. See *Association of American Physicians and Surgeons* v. *Weinberger,* 395 F. Supp. 125 (N.D. Ill. 1975), *aff. sub nom. Association of A.P. & S.* v. *Matthew,* —— U.S. —— 44 L.W. 3394 (Nov. 18, 1975). The above case clearly indicates that official review of a physician's practice does not interfere with any constitutional right to practice medicine or invade the privacy of patients. The statute involved protected confidentiality by coding, 42 U.S.C. § 1320, c-4(c). In similar manner P.H.L. § 3371 protects confidentiality of patient identity by limiting access. Yet while the three-judge court in the *Association* case pointed to the provision as negating any possible invasion of privacy, the court below ignored New York's provision.

2. The need for filing and patient identity was determined by the Legislature

The District Court simply assumed that the State could accomplish all the purposes of the triplicate prescription if patient identity was deleted from the filed prescriptions

* The Court below seemed to recognize, at one point, that plaintiffs' arguments were fallacious. *Roe* v. *Ingraham,* 364 F. Supp. at 545.

(11a). However this assumption ignores the purpose of the Legislature in enacting Article 33 and, in particular § 3332(2)(a), as to the contents of both the original and both copies of the prescription. The Legislature determined the need for patient identity, not the named defendant or his employees. Even if the computerization of patient names was necessary only in the area of patients obtaining more than a thirty day supply or going from doctor-to-doctor this problem was not beyond the power of the Legislature to address itself to. Furthermore, there was in the record proof that specific inquiries on users were being processed on a request basis.* And the decision ignored the use of filed prescriptions containing patient identity in checking on forgeries and raised prescripitions. Also contemplated by 3371(2) was use of the filed prescriptions in disciplinary proceedings, although patient identity would not be made public. How many instances the defendant used the computer and patient identity has no relevance to the constitutionality of filing, or the power of the Legislature.

California Bankers Ass'n v. *Shultz, supra,* 416 U.S., at 25-38 discusses the congressional purpose and the "usefulness" of the data collected, not how it will actually be used, if at all. At 30 it notes the lack of any challenge to the authority of the Legislature to treat the subject. Noted at 26, was Congress' extensive study. The same is the case here. *Roe* v. *Ingraham,* 364 F. Supp., at 545. Only an *actual* invasion of constitutionally protected privacy should have been considered, not how defendant administered the program and his results.**

* The only regular computer print-out containing patient identity was the over 30 day and doctor-to-doctor list.

** The fallaciousness of the "proof" that one case revealed by reviewing print-outs shows that the law is unconstitutional (11a) is demonstrated by the obvious fact that if a preliminary injunction had issued there would have been no cases. Or what number of "cases" would have made the statute constitutional?

The plaintiffs conceded (although they now attempt to repudiate this) the constitutionality of the prior law which allowed access to prescriptions by defendants' enforcement agents. 364 F. Supp., at 544. There was no "expectation of privacy" as to prescriptions. Thus there was no question the defendant had the right to have the information—i.e., patient identity, which he is now prohibited from having *via* the filing requirement. On the other hand the decision invalidating reporting continues to allow collection of patient identity by manual means, but not filing and computerization. But given the fiscal resources this is not feasible.*

What the decision below failed to take account of was that the State was not in any way regulating the practice of medicine (which power of regulation cannot be dismissed), but here rather monitoring the traffic in dangerous drugs, a serious health hazard to the public. Practitioners are not prohibited from prescribing Schedule II drugs.** In the area of drugs and their use, public safety has always been superior to private rights, whatever they may be. *Whipple* v. *Martinson,* 256 U.S. 41, 45 (1921); *Robinson* v. *California,* 370 U.S. 660, 664 (1962); see also *Brodsky* v. *Cal. State Board of Pharmacy,* 173 Cal. App. 2d 680, 344 P. 2d 68, 74 (1959); *State* v. *Braun,* 209 Kan. 181, 495 P. 2d 1000, 1004-1005 (1972), cert. denied 409 U.S. 991. When practitioners prescribe and patients receive dangerous drugs, reporting and computerization is reasonable. See *United States* v. *Biswell,* 406 U.S. 311, 316-317 (1972).

There is no support in *Roe* v. *Wade,* 410 U.S. 113 (1973) or *Doe* v. *Bolton,* 410 U.S. 179, 197 (1973), as cited for the opinion below, for the expansive concept that there is a virtually unlimited right to privacy in physician-patient

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* There are only 24 investigators for the whole State (4a-5a).

** The "inhibitions" plaintiffs testified to are simply products of their "fears", not the facts in the record.

matters. Even in *Doe,* the statute, requiring committee review of abortions, "substantially limited" the exercise of a physician's judgment. And ftn. 14 to *Paris Adult Theatre I.* v. *Slaton,* 413 U.S. 49, 66, also referred to "a protected intimate relationship". Only if that relationship already existed, did the "doctor's office" get involved. Quite the contrary, the activity the State in the instant case seeks to monitor, and only after the fact, is use of dangerous drugs. This activity by the State has always been permissible. Also this use may not really be medical. As in *Association of A.P. & S., supra,* the doctor's activities are not beyond review.

Why the plaintiffs should fear more effective monitoring is hard to fathom. The State properly seeks to protect them from unscrupulous practitioners. Their "fears" of misuse had no basis in fact. They were guided by doctors who simply misstated the statute's intent and scope. This continues to the present day. To extend the constitutional right of privacy to filing and computerization of data legitimately available to the State is a serious issue, given the increasing dependence of government on modern data processing in all areas.*

It must be emphasized that the State does not by filing or computerizing triplicate prescription know the patient's illness and the Record will show that the print-outs limited as they are, are usable only by state investigators with access to the complete doctor's file, if necessary. In no way, except by plaintiffs and plaintiffs' doctors injecting utterly false considerations in the prescription process, did patients claim they would, on their personal decisions, reject Schedule II drugs.** This was self-created "harm"

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* Filing is practiced in many areas subject to abuse, *i.e.,* income tax, lawyers' contingent fees, gun-sales, bank-transactions, securities regulation.

** The 125,000 prescriptions processed each month belie any claim medical practice is interfered with. Contrary to appellees' contentions, this does not mean that 125,000 patients went into the computer each month.

and an example of ingenuous pleading. *United States* v. *SCRAP, supra.*

The Legislature determined the need for filing. Whether filing will achieve all the purposes envisioned by the Legislature is not the issue. Whether these hopes are achieved in the end does not affect the law's constitutionality. See *James* v. *Strange,* 407 U.S. 128, 133 (1972); *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356, 378 (1973).

The question of the power of the Legislature is not to be confused with the scope of legislative considerations in dealing with the matter of policy. The District Court cannot indulge in a legislative judgment which it obviously did. *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago R.I. & R. Rd. Co.,* 393 U.S. 129, 136 (1968); see also *Cohen* v. *Beneficial Finance Corp.,* 337 U.S. 541, 548-549 (1949).

Filing and computerization of prescriptions is a modern, effective means to better control misuse and diversion of dangerous drugs. The Constitution does not require that the State choose ineffectual means of fulfilling its duty to protect the public health. *Cf. Rosario* v. *Rockefeller,* 410 U.S. 752, 762, ftn. 10 (1973). It is not for the Courts to determine the level of efficiency of defendant's operation. Or decide how readily the Department of Health can or should uncover irregularities.

Even if the instant legislation had not been the subject of extensive study, which it was, the supposed lack of scientific data would not be a bar to the regulation. As said in *Paris Adult Theatre I.* v. *Slaton, supra,* 413 U.S. at 60; "(i)t is not for us to resolve empirical uncertainties underlying State legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself." See also *Tyson & Brother* v. *Banton,* 273 U.S. 418, 446 (1927) (dissenting opinion, per Holmes, J.).

Whatever else, it is hardly "plain" that filing of triplicate prescriptions prevents anyone from receiving the medication his doctor desires for him, if that be a constitutional right (cf. *Association of A.P. & S.* v. *Weinberger, supra,* 395 F. Supp. at 134, 135, or that privacy will be invaded by filing of the data (cf. P.H.L. § 3371).

The purpose of the legislation was misstated by the Court below (11a-12a, ftn.) by saying the names on the form will not be of aid in preventing addicts from obtaining drugs by prescription. This ignores the law. P.H.L. § 3380 prohibits the prescribing, administering or dispensing of "controlled substances" to addicts or habitual users except for research, §§ 3324 *et seq.* (Title III) and under specific situations covered in Title V, §§ 3351 *et seq.* The assumption that addicts would not use their own names assumes they will violate another prohibition, P.H.L. § 3397, obtaining drugs (controlled substances) by fraud and deceit. A law cannot be assumed useless because people may violate it. The decision also assumed that the State had no interest in addicts. This is utterly false and a strange assertion. P.H.L. § 3372 requires doctors to report addicts or habitual users of any narcotic drug. Such legislation has been upheld. *Felber* v. *Foote,* 321 F. Supp. 85 (D.Conn. 1970).

The instant appeal has great significances as to the nature of a claim that gives legal standing to sue and the standard of review to be used by a court in examining the basis for legislation. Besides New York, three other states (California, Idaho and Illinois) operate, even now, similar systems. The decision below presents many significant issues warranting review by this Court.

CONCLUSION

For the foregoing reasons probable jurisdiction should be noted and the judgment reversed.

Dated: New York, New York, December 5, 1975.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellant
Office & P. O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-3396

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

A. SETH GREENWALD
Assistant Attorney General
Of Counsel

Appendix A, Opinion of Three-Judge Court, Roe v. Ingraham (S.D.N.Y. 73 Civ. 1303).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 1303

73 Civ. 1431

RICHARD ROE, an infant by ROBERT ROE, his parent; JOHN DOE, an infant by MARY DOE, his parent; JAMES MOE, an infant by MICHAEL MOE, his parent; JANE POE, MATTHEW T. BRODY, ISRAEL L. SCHMIERER, and EMPIRE STATE PHYSICIANS GUILD, INC.,

Plaintiffs,

against

HOLLIS S. INGRAHAM, as Commissioner of the State of New York Health Department,

Defendant,

GEORGE PATIENT, MARTHA PATIENT, GERALD L. LUSTIG, and THE AMERICAN FEDERATION OF PHYSICIANS AND DENTISTS,

Intervenors.

BEFORE:

HONORABLE WILFRED FEINBERG
United States Circuit Judge

HONORABLE INZER B. WYATT
United States District Judge

HONORABLE ROBERT L. CARTER
United States District Judge

OPINION

CARTER, District Judge

Status of Proceedings

This challenge to the constitutional validity of the New York Public Health Law, § 3300 et seq., pursuant to which under §§ 3331(6), 3332(a) and 3334(4) all prescriptions containing Schedule II substances must be filed with the Bureau of Controlled Substances, Licensing and Evaluation (BCSLE) in Albany on forms supplied by the state is before us on the merits. Plaintiffs seek to enjoin permanently so much of the statutory provisions under attack as require that the names of recipients of Schedule II drugs prescribed by licensed physicians as medications be filed with the state for computerization.

Since the history of the litigation has been set out in our prior opinion, reported at 364 F. Supp. 536, where we denied plaintiffs' motion for a preliminary injunction and defendant's motion to dismiss, we will advert only briefly to the background facts. In 1970 a Temporary New York State Commission to Evaluate the Drugs Laws was created. Its function was to recommend whatever modifications in the law were deemed necessary to meet existing problems in respect of drug abuse. In the Commission's Interim Report drugs were grouped into five schedules. Schedule II drugs (which are the concern of this litigation) recognizably have legitimate and worthwhile uses in the treatment of illnesses and disorders. (*Id.* at P. 10a). Among the Schedule II drugs in this category are, e.g., ritalin, codeine, percodan, morphine and hycodan. These drugs are useful in ameliorating pain, in the treatment of epilepsy, narcolepsy, hyperkinesia, schizoaffective disorders, and migraine headaches, but they also have a high potential for abuse. The legislation before us seeks to prohibit Schedule II legitimate drug medications from being diverted to illegal uses by

governmental oversight of the prescription, distribution and use of these drugs.

In our prior opinion we said that "[p]laintiffs' claims . . . raise novel and serious questions with potentially far reaching consequences as to the permissible reach of the protection afforded by the right of privacy as an independent constitutional guarantee," 364 F. Supp. at 544, and in refusing to dismiss the action we stated that "plaintiffs must be afforded the opportunity to demonstrate that the computerization of names is not necessary for the accomplishment of the state goals, that the controls developed by the state are inadequate to protect against unauthorized disclosure of the computerized information, and that injury to the plaintiffs resulting from the implementation of this system of centralized filing is sufficiently serious to overcome any competing state interest." *Id.* at 546-547.

Findings of Fact

The evidentiary facts relevant to decision on the merits were presented to us in four forms (1) by stipulated facts, (2) depositions taken on December 4 and 6, 1974, (3) exhibits, and (4) live testimony before the court on December 2, 1974. What follows are our findings of fact.

Special prescription forms are required for all Schedule II drugs, and such forms are sent to all qualified physicians who order them. The forms are serially numbered. A letter from the Commissioner of Health instructs physicians on how to secure and obtain the forms, and lists some of the Schedule II drugs and their trade names. A physician dispensing a Schedule II drug is required to keep one copy of the prescription and to mail the original and other copy to the BCSLE in Albany. When the physician prescribes but does not dispense the drug himself, he is again required to keep one copy of the form, but gives the original and remaining copy to the patient, who takes them to a pharmacist in order to have the prescription filled. The

pharmacist keeps the original and sends the copy to the BCSLE. The prescription form contains the name, address, telephone number and DEA[1] (Drug Enforcement Administration) number of the prescribing physician, the date the prescription was issued, the name, age and address of the patient, the name and amount of the drug prescribed, maximum daily dosage, the signature of the physician, the prescription number issued by the pharmacy, the date the prescription was filled, the NDC (National Drug Code) number of the drug, the DEA number of the pharmacy, and the signature of the dispenser.

The prescription forms are received in the mail room of BCSLE in Albany. Since April 1, 1973, the effective date of the Act, BCSLE has been receiving approximately 100,000 prescription forms per month. The forms are taken unopened to a receiving room where they are opened, coded, put into batches of 100 each and logged. These tasks are performed by approximately nine clerks. The batches are then taken into a "processing room" which is a part of the Office of Electronic Data Processing (OEDP). There the information on the forms is key punched onto a recorder disc and after the disc is filled, the information is put on magnetic tapes, and the disc is erased. The magnetic tapes are kept in drawers of a locked cabinet, but while the information is on the disc recorder, it is not kept under lock.

Dr. Arthur G. Baker, Associate Commissioner of Health for Community Health Services, has overall responsibility for the Schedule II prescription program. The BCSLE and the Bureau of Narcotic Control (BNC) are under his jurisdiction. BNC, directed by John J. Bellizzi, is empowered to investigate violations of the Public Health law and of Schedule II regulations. There are 14 BNC investigators in New York City and two each in Buffalo, Roches-

[1] DEA was formerly the Bureau of Narcotics and Dangerous Drugs (BNDD).

ter, Syracuse, White Plains and Albany. Joseph L. Cannizzaro is the BCSLE director, and his agency, in addition to processing, has responsibility for the retention and security of the forms. OEDA, headed by Joseph Bonacci, though a part of the Dept. of Health, apparently is not under Dr. Baker's jurisdiction but is responsible for processing the information contained on the forms onto computers. Approximately thirty-one employees of the Dept. of Health have access to all computerized information developed through the program.

As of the December, 1974, date of the trial, the program had then been in effective operation for roughly twenty months. The evidence presented by the state discloses that the computerized information is helpful in facilitating the study of the number of prescriptions filled per month by the average physician, and the number dispensed by the pharmacist; it aids in detecting instances of over-prescribing and over-dispensing, in detecting forgeries and counterfeit prescriptions. Thus far the uses derived from having the individual recipient's identity revealed were reported to be: (1) identifying those persons who using their own name go from doctor to doctor to obtain an illicit supply of drugs and (2) uncovering those receiving more than a 30-day supply of Schedule II drugs per month. Two such names have been discovered since the computerized program has been in operation. Both were referred to the BNC for investigation. In one case, the investigation disclosed a bona fide doctor-patient relationship, and in the other the investigation was still open when all evidentiary data was submitted for our consideration.

Testimony was presented by Joseph Jules Wasserman, who specializes in auditing the security and controls of computer systems, the burden of which was to demonstrate the weaknesses in the security system at the BCSLE and OEDP in the processing, computerizing and storing of the information on the prescription forms. Dr. Joseph

Martin Rosenberg, a psychologist, testified that the program had an adverse effect in respect of the doctor-patient relationship and would dissuade individuals who might need Schedule II drugs from undergoing required treatment.

At the hearing before us Michael Moe and Mary Doe expressed concern that their children, who are being treated with ritalin for hyperkinesia, will be stigmatized because the state will have a long file on their children in a narcotics and dangerous drug context. Mrs. Doe testified that she has taken her child off ritalin; the child is not doing well without the medication, but the alternative she feels is to have him branded for life. Jane Poe testified that she had had encephalitis followed by complications resulting in the loss of all control of the eyes so that they move uncontrollably in one direction or the other—an affliction called the oculogyric crisis. When she learned that under the new regulation her name was to go on a computer because the amphetamine with which her condition was treated was a Schedule II drug, she believed she would be labeled a drug addict.

Martha Patient, who suffers from migraine headaches, is treated by a medication containing fiorinal, codeine and cathedot. On learning that her name was to be reported to Albany and put on a computer when prescriptions for her medication were filled, she stopped the medication. Subsequently, however, her headaches returned, and she was forced to resume treatment. She has no confidence that information once put on a computer will remain confidential. George Patient has cancer of the lungs and had three ribs removed. Percodan was prescribed for the pain. When he learned his name would go to Albany, he tried other kinds of medication which did not work. Later he learned that he could get the drug through his union from out of state, and he now follows that course.

Four doctors testified: Mathew Brady, who does not believe any ethical doctor can live with the law; Stanley

Fishman, who testified to a belief that the law's requirement that patients be identified and their name recorded on a computer disc would have an adverse effect on the patient; Israel S. Schmierer, who expressed the view that the law entrenches upon the confidentiality of the patient-doctor relationship; and Gerald Lustig who refuses to prescribe any Schedule II drugs for his private patients. All testified that they felt obligated to advise their patients or a responsible member of their family about the state prescription program for Schedule II drugs, and reported a reaction of shock, fear and concern on the part of their patients on learning that their names would be sent to Albany and put on a computer.

Determination

The justification the State advances for the state prescription program, including identification of the patient being treated with a Schedule II drug, is the grave danger of abuse and consequential psychological dependence use of these drugs may cause. The issue is troublesome. The state seeks to deal with a well-recognized and prevalent evil—the wide-spread proliferation of drug abuse. In seeking through the legislation before us to prevent the diversion of Schedule II drugs to illegal use, the state manifestly is performing a legitimate governmental function. On the other hand plaintiffs assert that the statute in infringing upon the doctor-patient relationship intrudes on one of the zones of privacy accorded constitutional protection. If the plaintiffs' claims have validity, they are asserting rights which are at the core of "those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society [and those claims, therefore, are entitled to] respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs* v. *Cooper,* 336 U.S. 77, 89, 95 (1949) (Frankfurter, J. Concurring). *See also Griswold* v. *Connecticut,* 381 U.S. 479, 482-485

(1965); *Id.* at 486, 487-497 (Goldberg, J., concurring); *Id.* at 502, 503 (White, J., concurring).

Although the focus on privacy as a separate and distinct guarantee is of recent origin, *see Griswold* v. *Connecticut, supra; Eisenstadt* v. *Baird,* 405 U.S. 438 (1972); *Roe* v. *Wade,* 410 U.S. 113 (1973); *Doe* v. *Bolton,* 410 U.S. 179 (1973), Justice Blackmun, speaking for a majority of the Court, traced the right of privacy to "a line of decisions . . . going back perhaps as far as *Union Pacific R. Co.* v. *Botsford,* 141 U.S. 250, 251 (1891) [that] has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy" are given constitutional protection. *Roe* v. *Wade, supra,* at 152. It was pointed out that the right of privacy had been said to rest on the First Amendment, *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969); the Fourth and Fifth Amendments; *Terry* v. *Ohio,* 392 U.S. 1, 8-9 (1968); *Katz* v. *United States,* 389 U.S. 347, 350 (1967); the penumbras of the Bill of Rights, *Griswold* v. *Connecticut, supra,* at 484-485; on the Ninth Amendment, *Id.* at 486 (Goldberg, J. concurring), and on the concept of liberty guaranteed by the Fourteenth Amendment, *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923). *Ibid.* Only those rights basic to a free society or which are encapsulated within the concept of ordered liberty are included in the constitutional guarantee of privacy. Cited in precedential support for the conclusion that the right of privacy is of constitutional dimensions were *Eisenstadt* v. *Baird, supra,* at 453, 454; *Loving* v. *Virginia,* 388 U.S. 1, 12 (1967); *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944); *Skinner* v. *Oklahoma,* 316 U.S. 535, 541-542 (1942); *Pierce* v. *Society of Sisters,* 268 U.S. 510, 535 (1925); and *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923). The short description of each of these cases gives an expanded reading of the zone of privacy protected. *Id.* at 152-153.

By the very nature of our society which distinguishes the spiritual from the profane, church from state, inherent and inalienable rights from those rights that govern-

ment may give or withhold, *a fortiori* a concept of privacy must inevitably emerge. Konvitz, *Privacy and the Law: A Philosophical Prelude,* 31 Law & Contemp. Prob. 272, 273 (1966). The concept of privacy is an affirmation of the importance of certain aspects of the individual and his desired freedom from needless outside interference. It is sometimes described as a sphere of space that a man may carry with him which is protected from unwarranted outside intrusion, as the right of selected disclosures about oneself and as a right of personal autonomy. Henkin, *Privacy and Autonomy,* 74 Colum. L. Rev. 1410 (1974). Konvitz, *supra.*

"[I]t is apparent [therefore] *that* the right of privacy is constitutionally protected. It is *when* and *how* which create the problems." *Roberts* v. *Clement,* 252 F. Supp. 835, 845, 848 (E.D. Tenn. 1966) (Darr, J. concurring) (emphasis in the original); Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case,* 64 Mich. L. Rev. 235 (1965); Parker, *A Definition of Privacy,* 27 Rut. L. Rev. 275 (1974); Gross, *The Concept of Privacy,* 42 NYU L. Rev. 34 (1967); Note, 26 Stan. L. Rev. 1161 (1974); Note, 48 NYU L. Rev. 670 (1973). Our task, however, has been simplified since we read *Roe* v. *Wade,* as holding implicitly and *Doe* v. *Bolton,* 410 U.S. at 197 (1973), as holding explicitly that the doctor-patient relationship is one of the zones of privacy accorded constitutional protection. Justice Douglas has described the expectation of privacy in the doctor-patient relationship as being exceeded only by that expectation in the relationship of a penitent to his priest. *Id.* at 219. *Paris Adult Theatre I.* v. *Slaton,* 413 U.S. 49 (1973), reaffirmed the holding in *Roe* and *Doe* that privacy embraced the doctor-patient relationship. There it was said, at page 66, note 13: "the constitutionally protected privacy of family, marriage, motherhood, procreation and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doc-

tor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved." While the doctor-patient relationship involved in *Roe* and *Doe* concerned the most intimate personal relationships, sexual relations and "whether to bear or beget a child," *Eisenstadt* v. *Baird, supra,* at 453, and the right of privacy has primarily focused on home and family, it would be too restricted a reading of precedent for us to hold that the physician-patient relationship here is not constitutionally protected merely because it does not concern medical advice or professional judgments concerning child bearing. *See Roe* v. *Ingraham,* 480 F. 2d 102, 107 (2d Cir. 1973).

An individual's physicial ills and disabilities, the medication he takes, the frequency of his medical consultation are among the most sensitive of personal and psychological sensibilities. One does not normally expect to be required to have to reveal to a government source, at least in our society, these facets of one's life. Indeed, generally one is wont to feel that this is nobody's business but his doctor's and his pharmacist's. When these physical illnesses and disabilities require as here treatment by drugs which, in light of the current epidemic of drug abuse in the society, are under governmental control and regulation, there is legitimate concern that information that one, one's children or an intimate is under treatment with such drugs not be broadcast to unauthorized sources. There is fear that the adults or children will be stigmatized if their use of the drug becomes known. There is no question but that the statutory requirement challenged here intrudes upon and interferes with the doctor-patient relationship.

Even though the right of privacy which we find to exist in the doctor-patient relationship at issue in this case is constitutionally protected, it is equally clear that the right has limitations. When the state interest asserted is compelling, the right of privacy may be impinged upon, but "a governmental purpose to control or prevent activities

constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms," *NAACP* v. *Alabama,* 377 U.S. 288, 307 (1964); *Erznoznik* v. *City of Jacksonville,* —— U.S. ——, 42 L.W. 4809, 4813 (decided June 24, 1975); *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960); *Cantwell* v. *Connecticut,* 310 U.S. 296, 304 (1940); where fundamental rights are involved, "[p]recision of regulation must be the touchstone." *NAACP* v. *Button,* 371 U.S. 415, 438 (1963).

Concededly the state effort to control drug abuse and to prevent illicit trafficking in dangerous drugs fosters a legitimate state purpose, and ordinarily we would be reluctant to interfere. The regulatory scheme, however, has a needlessly broad sweep. The state prescription form program provides for issuing serially numbered prescription forms to physicians. Each doctor prescribing and each pharmacist dispensing any Schedule II drugs are given a DEA number. They, therefore, are readily identifiable. The state can promptly determine the quantity of drugs prescribed and dispensed by particular physicians and pharmacists. Over-prescribing or dispensing, forgeries and thefts can be detected. Having the name of the person receiving the drugs on the state's form adds nothing. Indeed, admittedly the only purpose this information serves is to identify individual patients who without using an alias go from doctor to doctor to secure Schedule II drugs and those individuals who secure more than a 30-day supply in any single month. During the 20-month life of the program only one such unresolved incident in this category had been unearthed. The diminution of a constitutionally guaranteed freedom is too great a price to pay for such a small governmental yield.[2]

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[2] There is no state claim that the names on the form will be of aid in preventing addicts from access to drugs by prescription. They,

(*footnote continued on following page*)

The state argues that it is doing no more than it did under the old regulations when prescriptions with the patient's name were required to be kept by pharmacists for inspection. That argument must be rejected. The intrusion here is not only more immediate, its impact is greater. A name on a prescription in the files of one of many thousands of pharmacists in the state of New York is entirely different from one's name on a form in Albany which is transferred to computerized records and stored for instant retrieval.

We are reinforced in the belief that the right of privacy covers the situation of the doctor-patient relationship involved in this case by the Supreme Court's decision in another area. In *California Bankers Ass'n* v. *Shultz,* 416 U.S. 21 (1974), the concurring (*Id.* at 78) and dissenting (*Id.* at 79, 91, 93) opinions which secured adherence from a majority of the Court, made clear that if the regulations or the statute had been read as an unrestricted requirement that all bank transactions of whatever dimension be reported, the Bank Secrecy Act would have been held to have been an invalid intrusion upon the "legitimate expectations of privacy," of rank and file depositors. (Powell, J. concurring, 416 U.S. at 79). What saved the act from condemnation was the view of Justices Powell and Blackmun that the restricted reach of the reporting requirement made the intrusion sufficiently discrete that it did not entrench unwarrantedly upon the zone of privacy.

(*footnote continued from preceding page*)

of course, would not use their own name or the same name in going from doctor to doctor. The doctors who testified before us all stated, without being controverted, that they could readily recognize an addict who came to their office seeking a drug by prescription, because they would ask for a specific drug and be vague about their illness and the name of their physician who had prescribed the medication initially. Moreover, the program is not designed to ferret out addicts in any case.

Accordingly, we hold that so much of the New York Health Law as requires reporting to state authorities in Albany the names and addresses of patients who receive Schedule II drugs as medication prescribed by duly licensed physicians is an unconstitutional interference with plaintiffs' rights of privacy guaranteed under the Fourteenth Amendment. The bases for our decision make unnecessary an evaluation of the operative state measures to insure confidentiality.

SETTLE ORDER ON NOTICE.

Dated: New York, New York, August 13, 1975.

WILFRED FEINBERG
Circuit Judge

INZER B. WYATT
District Judge

ROBERT L. CARTER
District Judge

Appendix B, Judgment Appealed From.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 1303

73 Civ. 1431

RICHARD ROE, an infant by ROBERT ROE, his parent; JOHN DOE, an infant by MARY DOE, his parent; JAMES MOE, an infant by MICHAEL MOE, his parent; JANE POE, MATTHEW T. BRODY, ISRAEL L. SCHMIERER, and EMPIRE STATE PHYSICIANS GUILD, INC.,

Plaintiffs,

against

ROBERT P. WHALEN, as Commissioner of Health of the State of New York,

Defendant,

GEORGE PATIENT, MARTHA PATIENT, GERALD L. LUSTIG, and THE AMERICAN FEDERATION OF PHYSICIANS AND DENTISTS,

Intervenors.

Plaintiffs above named having filed a complaint for a declaratory judgment and an injunction in this matter and Intervenors having thereafter also filed such a complaint and the two matters having been consolidated for discovery and trial; and the parties having submitted (1) a stipulation of facts set forth in the pretrial order made herein on November 18, 1974 and (2) evidence (testimony and exhibits) in deposition form pursuant to the pretrial order made herein on November 21, 1974; and the Court having considered such stipulation of facts and evidence and the

evidence presented at trial held herein on December 2, 1974; and after due deliberation, the Court having rendered its decision herein by opinion filed on August 13, 1975; and this Court having made an order on October 2, 1975 pursuant to F.R.Civ.P. 25(d) substituting the present Commissioner of Health of the State of New York, Robert P. Whalen, as the defendant herein, for his predecessor Hollis S. Ingraham:

Now, therefore, on all prior proceedings and on the record herein, IT IS ORDERED, ADJUDGED AND DECREED THAT

1. Sections 3331(6), 3332(2)(a) and 3333(4) of the New York Public Health law insofar as they require disclosure to the State of New York of the identity of patients receiving prescriptions for Schedule II controlled substances be, and hereby are, declared to be an unconstitutional interference with plaintiffs' rights of privacy guaranteed under the Fourteenth Amendment of the United States Constitution.

2. Defendant Robert P. Whalen, Commissioner of Health of the State of New York, his agents, servants and employees be, and hereby are, enjoined and restrained from (a) enforcing those provisions of Sections 3331(6), 3332(2)(a) and 3333(4) of the New York Public Health law which require disclosure to the State of New York of the identity of patients receiving Schedule II controlled substances; (b) accepting for filing prescription forms (or copies thereof) or any other documents disclosing the identities of patients receiving prescriptions for Schedule II controlled substances; and (c) requiring physicians or pharmacists to complete and file with any agency of the State of New York any prescription forms (or copies thereof) disclosing the identity of patients receiving prescriptions for Schedule II controlled substances.

3. Defendant Robert P. Whalen, Commissioner of Health of the State of New York, shall, within 60 days from the date hereof, (a) cause to be destroyed all New York State prescription forms previously filed with the New York State Department of Health containing the identities of patients receiving prescriptions for Schedule II controlled substances; and (b) cause to be expunged patients' names on all records made from the New York State prescription forms, including but not limited to computer tapes and discs.

4. Within 14 days after the destruction of records and expungement of patients' names required by paragraph "3" hereinabove, defendant Robert P. Whalen, Commissioner of Health of the State of New York, shall cause to be filed an affidavit in this matter, describing the time, place and manner of such destruction and expungement and containing an itemization of all records destroyed and of all records on which the patients' names have been expunged.

5. Paragraphs "3" and "4" of this judgment are stayed on condition that defendant timely file a notice of appeal to the United States Supreme Court as provided by law, and such stay shall continue until disposition of the appeal or until further order of the Supreme Court. During the pendency of the stay provided herein, defendant shall maintain all New York State triplicate prescription forms or records made therefrom containing the identities of patients receiving Schedule II controlled substances in a sealed vault or other equally secure place and is enjoined from adding any patients' names to the computer discs and tapes under defendant's control or otherwise making from the New York State triplicate prescription forms any record containing the name of a patient receiving Schedule II controlled substances.

6. Jurisdiction is hereby retained by the Court for the purpose of entering such further orders as may be necessary or appropriate to effectuate the terms of this final order and judgment.

Dated: New York, New York
October 9, 1975

WILFRED FEINBERG
United States Circuit Judge

INZER B. WYATT
United States District Judge

ROBERT L. CARTER
United States District Judge

JUDGMENT ENTERED—10/9/75

RAYMOND F. BURGHARDT
Clerk

Appendix C, Notice of Appeal (Filed October 20, 1975).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 1303
73 Civ. 1431
(RLC)

RICHARD ROE, an infant by ROBERT ROE, his parent; JOHN DOE, an infant by MARY DOE, his parent; JAMES MOE, an infant by MICHAEL MOE, his parent; JANE POE, MATTHEW T. BORDY, ISRAEL L. SCHMIERER and EMPIRE STATE PHYSICIANS GUILD, INC.,

Plaintiffs,

against

ROBERT P. WHALEN, as Commissioner of Health of the State of New York,

Defendant,

and

GEORGE PATIENT, MARTHA PATIENT, GERALD L. LUSTIG, and THE AMERICAN FEDERATION OF PHYSICIANS AND DENTISTS,

Intervenors.

SIRS:

PLEASE TAKE NOTICE that pursuant to 28 U.S.C. § 1253, the defendant Robert P. Whalen, as substituted for the original defendant Hollis S. Ingraham, hereby appeals to the United States Supreme Court from a final judgment and order of a statutory three-judge District Court entered in the United States District Court for the Southern District of New York on October 9, 1975, and this appeal is taken from each and every part of the final order and judgment except that portion of the fifth ("5") decretal paragraph, which grants a stay of paragraphs "3" and "4", namely the first sentence of "5", which is conditioned on

timely filing of this notice of appeal; this appeal is taken from the second sentence in paragraph "5".

Dated: New York, New York, October 17, 1975.

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for defendant
By

s/
A. SETH GREENWALD
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-3396

To: CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Foley Square
New York, New York 10007

SHEA GOULD CLIMENKO KRAMER
& CASEY (and SOLOMON Z. FERZIGER)
330 Madison Avenue
New York, New York 10017

NORWICH RAGGIO & JAFFE
Two Pennsylvania Plaza
New York, New York 10001

Appendix D, Article 33, Public Health Law (Pertinent Portions).

TITLE I—GENERAL PROVISIONS (in part)

• • •

§ 3304. Prohibited acts

It shall be unlawful for any person to manufacture, sell, prescribe, distribute, dispense, administer, possess, have under his control, abandon, or transport a controlled substance except as expressly allowed by this article.

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§ 3306. Schedules of controlled substances

There are hereby established five schedules of controlled substances, to be known as schedule I, II, III, IV and V respectively. Such schedules shall consist of the following substances by whatever name or chemical designation known:

• • •

SCHEDULE II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (1), except that these substances shall not include the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) Coca leaves and any salt, compound, derivative,

or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Alphaprodine.
(2) Anileridine.
(3) Bezitramide.
(4) Dihydrocodeine.
(5) Diphenoxylate.
(6) Fentanyl.
(7) Isomethadone.
(8) Levomethorphan.
(9) Levorphanol.
(10) Metazocine
(11) Methadone.
(12) Methadone-Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane.
(13) Moramide-Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid.
(14) Pethidine.
(15) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine.
(16) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate.
(17) Pethidine-Intermediate-C, 1 methyl-4-phenylpiperidine-4-carboxylic acid.
(18) Phenazocine.
(19) Piminodine.
(20) Racemethorphan.

(21) Racemorphan.

(22) Etorphine hydrochloride.

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers;

(2) Phenmetrazine and its salts;

(3) Any substance which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers;

(4) Methylphenidate.

(d) Unless specifically excepted or unless listed in another schedule, methaqualone or any salts, isomers or salts of isomers of methaqualone.

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TITLE IV—DISPENSING TO ULTIMATE USERS

§ 3330. Schedule I substances

No prescription may be made or filled for any controlled substance in schedule I nor may such substance be possessed, distributed, dispensed or administered except pursuant to title III of this article.

§ 3331. Scheduled substances administering and dispensing by practitioners

1. Except as provided in titles III or V of this article, no substance in schedules II, III, IV, or V may be prescribed for or dispensed or administered to an addict or habitual user.

2. A practitioner, in good faith, and in the course of his professional practice only, may prescribe, administer and dispense substances listed in schedules II, III, IV, and V, or he may cause the same to be administered by a designated agent under his direction and supervision.

3. A veterinarian, in good faith, and in the course of the practice of veterinary medicine only, may prescribe, administer and dispense substances listed in schedules II, III, IV, and V or he may cause them to be administered by a designated agent under his direction and supervision.

4. No such substance may be dispensed unless it is enclosed within a suitable and durable container upon which is indelibly typed, printed or otherwise legibly written upon an orange label affixed to such container in a manner which would inhibit its removal, the following:

(a) the name and address of the ultimate user for whom the substance is intended, or, if intended for use upon an animal, the species of such animal and the name and address of the owner or person in custody of such animal;

(b) the name, address, and telephone number of the dispensing practitioner;

(c) specific lirections for use, including but not limited to the dosage and frequency of dosage, and the maximum daily dosage;

(d) the legend, prominently marked or printed in either boldface or upper case lettering: "CONTROLLED SUBSTANCE, DANGEROUS UNLESS USED AS DIRECTED";

(e) the date of dispensing;

(f) either the name of the substance or such code number assigned by the department for the particular substance pursuant to section thirty-three hundred eighteen of this article.

5. No more than a thirty day supply or, pursuant to regulations of the commissioner enumerating conditions warranting specified greater supplies, no more than a three month supply of a schedule II, III or IV substance, as determined by the directed dosage and frequency of dosage, may be dispensed by an authorized practitioner at one time.

6. A practitioner dispensing a substance which may be prescribed only upon an official New York state prescription must at the time of such dispensing prepare an official New

York state prescription in the manner set forth in subdivision two of section thirty-three hundred thirty-two of this article. The practitioner shall retain one copy for five years and shall file the original and one copy with the department by not later than the fifteenth day of the next month following the month in which the substance was delivered. This requirement shall not apply to the dispensing by a practitioner pursuant to section thirty-three hundred fifty-two of this article. (emphasis supplied and following)

§ 3332. Making of official New York state prescriptions for scheduled substances

1. No substance for which an official New York state prescription is required may be prescribed by a practitioner except on an official New York state prescription, and in good faith and in the course of his professional practice only.

2. Such prescription shall be prepared in triplicate, written with ink, indelible pencil or, apart from the practitioner's signature, typewriter. The original and both copies must contain the follow:

(a) the name, address, and age of the ultimate user for whom the substance is intended, or, if the ultimate user is an animal, the species of such animal and the name and address of the owner or person in custody of such animal;

(b) the name, address, registration number, telephone number, and handwritten signature of the prescribing practitioner;

(c) specific directions for use, including but not limited to the dosage and frequency of dosage and the maximum daily dosage;

(d) the date upon which such prescription was actually signed by the prescribing practitioner.

3. No such prescription shall be made for a quantity of substances which would exceed a thirty day supply or, pursuant to regulations of the commissioner enumerating conditions warranting specified greater supplies, for a quantity

of substances which would exceed a three month supply, if the substance were used in accordance with the directions for use.

4. The practitioner shall retain one copy of such prescription for five years and shall deliver the original and one copy to the ultimate user.

§ 3333. Dispensing upon official New York state prescription

1. A licensed pharmacist may, in good faith, and in the course of his professional practice, sell and dispense to an ultimate user controlled substances for which an official New York state prescription is required only upon the delivery to such pharmacist, within thirty days of the date such prescription was signed by an authorized practitioner, of the original and one copy of such official New York state prescription.

2. No such substance may be so dispensed or sold unless it is enclosed within a suitable and durable container and affixed to such container in a manner which would inhibit its removal is an orange label upon which is indelibly typed, printed, or otherwise legibly written:

(a) the name and address of the ultimate user for whom the substance is intended, or if intended for use upon an animal, the species of such animal and the name and address of the owner or person in custody of such animal;

(b) the name, address, and telephone number of the pharmacy from which such substance is dispensed;

(e) specific directions for use as stated on the prescription;

(d) the name of the prescribing practitioner;

(e) the legend, prominently marked or printed in either boldface or upper case lettering: "CONTROLLED SUBSTANCE, DANGEROUS UNLESS USED AS DIRECTED";

(f) the number of the prescription under which it is recorded in the pharmacist's prescription file;

(g) the date of filling; and

(h) such code number assigned by the department for the particular substance pursuant to section thirty-three hundred eighteen of this article, or when requested by the practitioner, the name of such substance.

3. The pharmacist filling the prescription shall endorse upon the original and copy thereof the date of delivery, his signature, and the registration number of the pharmacy.

4. The endorsed original prescription shall be retained by the proprietor of the pharmacy for a period of five years. The endorsed copy of such prescription shall be filed with the department by not later than the fifteenth day of the next month following the month in which the substance was delivered.

§ 3334. Emergency oral prescriptions for schedule II drugs

1. In an emergency situation, as defined by rule or regulation of the department, a practitioner may orally prescribe and a pharmacist may dispense to an ultimate user controlled substances in schedule II; provided however the pharmacist shall:

(a) contemporaneously reduce such prescription to writing;

(b) dispense the substance in conformity with the labeling requirements applicable to the type of prescription which would be required but for the emergency; and

(c) make a good faith effort to verify the practitioner's identity, if the practioner is unknown to the pharmacist.

2. No oral prescription shall be filled for a quantity of controlled substances which would exceed a five day supply if the substance were used in accordance with the directions for use.

3. Within seventy-two hours after authorizing an emergency oral prescription, the prescribing practitioner shall cause to be delivered to the pharmacist the original and

one copy of an official New York state prescription. Such prescription shall, in addition to the information otherwise required, also have written or typed upon its face the words: "Authorization for emergency dispensing." If the pharmacist fails to receive such prescription he shall notify the department in writing within seven days from the date of dispensing the substance.

4. Such official New York state prescription shall be endorsed, retained and filed in the same manner as is otherwise required for such prescriptions.

§ 3335. Making of written prescriptions for controlled substances

1. Except as provided in section thirty-three hundred thirty-seven, substances in schedules III, IV and V for which an official New York state prescription is not required, may be prescribed by a practitioner only on a written prescription made in good faith and in the course of his professional practice.

2. Such written prescription shall be prepared in the same manner and contain the same information as is required by subsection two of section thirty-three hundred thirty-two of this article, except that an official New York state prescription need not be used and the practitioner need not prepare, deliver or retain copies of the prescription.

3. No such prescription shall be made for a quantity of substances which would exceed a thirty day supply or, pursuant to regulations of the commissioner enumerating conditions warranting specified greater supplies, for a quantity of substances which would exceed a three month supply, if the substance were used in accordance with the directions for use.

§ 3336. Dispensing upon written prescription

1. A licensed pharmacist may, in good faith and in the course of his professional practice, dispense to an ultimate

user controlled substances in schedules III, IV, or V for which an official New York state prescription is not required, upon delivery to such pharmacist of a written prescription within thirty days of the date such prescription was signed by an authorized practitioner.

2. Such substance may be dispensed only if packaged and labeled in conformity with the provisions of subsection two of section thirty-three hundred thirty-three of this article.

3. The pharmacist filling the written prescription shall endorse his signature and the date of delivery to the ultimate user. Such endorsed prescription shall be retained by the proprietor of the pharmacy for a period of five years.

§ 3337. Oral prescriptions schedule III, IV and V substances

1. A practitioner may orally prescribe and a pharmacist may dispense to an ultimate user controlled substances in schedules III, IV or V for which an official New York state prescription is not required; provided however the pharmacist shall:

(a) contemporaneously reduce such prescription to writing;

(b) dispense the substance in conformity with the labeling requirements applicable to a written prescription; and

(c) make a good faith effort to verify the practitioner's identity, if the practioner is unknown to the pharmacist.

2. No oral prescription shall be filled for a quantity of controlled substances which would exceed a five day supply if the substance were used in accordance with the directions for use, except that with respect to a schedule IV substance such prescription shall not exceed a thirty-day supply or one hundred dosage units, whichever is less.

3. Within seventy-two hours after authorizing such an oral prescription, the prescribing practitioner shall cause to be delivered to the pharmacist a written prescription.

If the pharmacist fails to receive such prescription he shall make a record of such fact in such manner and detail as the commissioner, by regulation, shall require.

4. Such written prescription shall be endorsed, retained and filed in the same manner as is otherwise required for such prescriptions.

Added L.1972, c. 878, § 2; amended L.1974, c. 960, § 1; L.1974, c. 961, § 1; L.1974, c. 965, § 13.

§ 3338. Official New York state prescription forms

1. Official New York state prescription forms shall be prepared and issued by the department in groups of one hundred forms, each form in triplicate and serially numbered. Such forms shall be furnished at a cost of ten dollars per group of one hundred forms to practitioners authorized to write such prescriptions and to institutional dispensers. Such prescription blanks shall not be transferable.

2. Except as expressly authorized by section thirty-three hundred thirty-four, substances listed in schedule II may be prescribed or dispensed only upon an official New York state prescription.

3. The commissioner may, by rule or regulation, require that a particular substance in schedule III or schedule IV, or particular preparations containing such substance, be prescribed or dispensed upon an official New York state prescription.

4. The commissioner is hereby authorized and empowered to make rules and regulations, not inconsistent with this article, with respect to the retention or filing of such forms, the maximum number of forms which may be issued at any one time, the period of time after issuance by the department that such form shall remain valid for use, and the manner in which practitioners associated with institutional dispensers may use such forms, or any other matter of procedure or detail necessary to effectuate or clarify the provisions of this section and to secure

proper and effective enforcement of the provisions of this article.

5. Upon a finding by the commissioner that a person has wilfully failed to comply with the provisions of this article, the commissioner may revoke, cancel or withhold official New York state prescription forms which have been issued or for which application has been made.

§ 3339. Refilling of prescriptions for controlled substances

1. An official New York state prescription may not be refilled.

2. A written prescription may be refilled not more than the number of times specifically authorized by the prescriber upon the prescription, provided however no such authorization shall be effective for a period greater than six months from the date the prescription is signed. In the event that the prescription authorizes the dispensing of more than a thirty day supply of schedule III, schedule IV or schedule V substances pursuant to regulations of the commissioner enumerating conditions warranting specified greater supplies, the prescription may be refilled only once.

3. Unless an earlier refilling is authorized by the prescriber, no written prescription may be refilled earlier than seven days prior to the date the previously dispensed supply would be exhausted if used in conformity with the directions for use.

§ 3341. Institutional dispensers certificates of approval

1. No institutional dispenser as herein before defined, shall receive, possess or cause controlled substances to be administered or dispensed without first having been issued a certificate of approval authorizing such activity by the commissioner.

2. Upon application of an institutional dispenser for a certificate of approval, the commissioner shall issue such certificate if he is satisfied that:

(a) the applicant and its managing officers are of good moral character;

(b) the applicant possesses the necessary land, building, paraphernalia and staffs to properly carry on the activities described in the application;

(c) the applicant will be able to maintain effective control against diversion of controlled substances; and

(d) the applicant will be able to comply with all applicable state and federal laws.

3. Institutional dispenser to whom such certificates have been issued shall thereafter register biennially with the department. The fee for such certificate and for each biennial registration shall be twenty-five dollars.

4. Certificates and registrations issued under this section shall be effective only for and shall specify:

(a) the name and address of the institutional dispenser;

(b) the nature of the controlled substance, or substances, either by name or schedule, or both, for which the certificate or registration is issued.

§ 3342. Dispensing and administering by institutional dispensers

1. An institutional dispenser may cause controlled substances to be administered or dispensed for use on its premises or for the immedite care or treatment of a patient lawfully being transferred in an emergency situation, as defined by rule or regulation of the commissioner, to an alternative medical facility only pursuant to a written order by a practitioner for medication. Such orders shall be made and preserved in the manner and form as the commissioner shall, by regulation, prescribe.

2. An institutional dispenser may dispense controlled substances for use off its premises only pursuant to a prescription, prepared and filed in conformity with this title.

3. An institutional dispenser shall maintain records of all controlled substances dispensed and administered in such manner as the commissioner shall, by regulation, require.

§ 3343. Reports and records

1. Prescriptions and copies of prescriptions shall be preserved in the following manner:

(a) prescribing practitioners and dispensing practitioners shall preserve the retained copy of an official New York state prescription in a separate file maintained exclusively for such records;

(b) pharmacists dispensing controlled substances upon prescription shall preserve such prescriptions in such manner as the commissioner shall, by regulation, require.

2. Practitioners and pharmacies shall maintain records of all controlled substances received and dispensed in such manner as the commissioner shall, by regulation, require.

§ 3345. Possession of controlled substances by ultimate users original container

Except for the purpose of current use by the person or animal for whom such substance was prescribed or dispensed, it shall be unlawful for an ultimate user of controlled substances to possess such substance outside of the original container in which it was dispensed.

Violation of this provision shall be an offense punishable by a fine of not more than fifty dollars.

TITLE V—DISPENSING TO ADDICTS AND HABITUAL USERS (in part)

§ 3350. Dispensing prohibition

Controlled substances may not be prescribed for, or administered or dispensed to addicts or habitual users of

controlled substances, except as provided by this title or title III.

§ 3351. Dispensing for medical use

1. Controlled substances may be prescribed for, or administered or dispensed to an addict or habitual user:

(a) during emergency medical treatment unrelated to abuse of controlled substances;

(b) who is a bona fide patient suffering from an incurable and fatal disease such as cancer or advanced tuberculosis;

(c) who is aged, infirm, or suffering from serious injury or illness and the withdrawal from controlled substances would endanger the life or impede or inhibit the recovery of such person.

2. Controlled substances may be ordered for use by an addict or habitual user by a practitioner and administered by a practitioner or registered nurse to relieve acute withdrawal symptoms.

3. Methadone, or such other controlled substance designated by the commissioner as appropriate for such use, may be ordered for use of an addict by a practitioner and dispensed or administered by a practitioner or his designated agent as interim treatment for an addict on a waiting list for admission to an authorized maintenance program.

4. Methadone, or such other controlled substance designated by the commissioner as appropriate for such use, may be administered to an addict by a practitioner or by his designated agent acting under the direction and supervision of a practitioner, as part of a regime designed and intended to withdraw a patient from addiction to controlled substances.

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§ 3356. Central registry confidentiality

1. The department shall establish or cause to be established a central registry as part of which the following information shall be assembled:

(a) the name and other identifying data relating to each reported addict;

(b) the status of each addict awaiting admission to an approved program or programs;

(c) the status of each addict in an approved program.

2. Identifying data in such registry with respect to an individual addict shall be available only to:

(a) a practitioner attempting to ascertain the status of an addict seeking treatment with him or admission to a program with which he is associated;

(b) an agency, department of government, or commission established pursuant to the mental hygiene law and authorized to gather such information.

TITLE VI—RECORDS AND REPORTS

§ 3370. Preserving and inspection of records

1. Any record, including prescriptions, required to be kept or maintained by this article shall be preserved for a period of at least five years following the date of the event or transaction recorded, unless a shorter period of time is specifically provided.

2. Such records shall be made available during business hours for inspection and copying by any officer or employee of the department who is charged with the enforcement of this article and to any officer or employee of this state charged with the duty of regulating or licensing of any person who by virtue of such license is authorized to obtain, distribute, dispense or administer controlled substances.

3. [See, also, subd. 3 below] Every record, including prescriptions, required to be kept under this article shall

be maintained at the premises where the licensed activity is conducted.

3. [See, also, subd. 3 above] The department shall cause to be expunged or otherwise destroyed, within five years from the date of receipt thereof, any record of the name of any patient received by it pursuant to the filing requirements of subdivision six of section thirty-three hundred thirty-one, subdivision four of section thirty-three hundred thirty-three, and subdivision four of section thirty-three hundred thirty-four of this article.

§ 3371. Confidentiality of certain records, reports, and information

1. No person, who has knowledge by virtue of his office of the identity of a particular patient or research subject, a manufacturing process, a trade secret or a formula shall disclose such knowledge, or any report or record thereof, except:

(a) to another person employed by the department for purposes of executing provisions of this article; or

(b) pursuant to judicial subpoena or court order in a criminal investigation or proceeding; or

(c) to an agency, department of government, or official board authorized to regulate, license or otherwise supervise a person who is authorized by this article to deal in controlled substances, or in the course of any investigation or proceeding by or before such agency, department or board.

(d) to a central registry established pursuant to this article.

2. In the course of any proceeding where such information is disclosed, except when necessary to effectuate the rights of a party to the proceeding, the court or presiding officer shall take such action as is necessary to insure that such information, or record or report of such information is not made public.

§ 3372. Practitioner patient reporting

It shall be the duty of every attending practitioner and every consulting practitioner to report promptly to the commissioner, or his duly designated agent, the name and, if possible, the address of, and such other data as may be required by the commissioner with respect to, any person under treatment if he finds that such person is an addict or a habitual user of any narcotic drug. Such report shall be kept confidential and may be utilized only for statistical, epidemiological or research purposes, except that those reports which originate in the course of a criminad proceeding other than under section 81.25 of the mental hygiene law shall be subect only to the confidentiality requirements of section thirty-three hundred seventy-one of this article.

§ 3373. Confidential communications

For the purposes of duties arising out of this article, no communication made to a practitioner shall be deemed confidential within the meaning of the civil practice law and rules relating to confidential communications between such practitioner and patient.

§ 3374. Notification by licensee

Persons licensed or certified pursuant to this article shall be under a continuing duty to promptly notify the department of:

1. Each incident or alleged incident of theft, loss or possible diversion of controlled substances manufactured, ordered, distributed or possessed by such person;

2. Any charge or proceeding brought in any court or before any governmental agency, state or federal, in which it is alleged that the licensee, its employees, subsidiaries, managing officers, or directors has failed to comply with the provisions of the federal controlled substances act or the laws of any state relating to controlled substances.

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TITLE VII—OFFENSES, VIOLATIONS AND ENFORCEMENT
(in part)

§ 3385. Enforcement

1. (a) The department and its representatives shall have access during business hours to all orders, prescriptions or records required to be kept under this article.

(b) Orders, prescriptions and records required to be kept under this article shall be maintained at the premises where the licensed activity is conducted.

2. For the purposes of this article, each employee of the department designated by the commissioner shall possess all of the powers of a peace officer.

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§ 3397. Fraud and deceit

1. No person shall:

(a) obtain or attempt to obtain a controlled substance, a prescription for a controlled substance or an official New York State prescription form,

(i) by fraud, deceit, misrepresentation or subterfuge; or

(ii) by the concealment of a material fact; or

(iii) by the use of a false name or the giving of a false address;

(b) wilfully make a false statement in any prescription, order, application, report or record required by this article;

(c) falsely assume the title of, or represent himself to be, a licensed manufacturer, distributor, pharmacy, pharmacist, practitioner, researcher, approved institutional dispenser, or other authorized person, for the purpose of obtaining a controlled substance;

(d) make or utter any false or forged prescription or false or forged written order;

(e) affix any false or forged label to a package or receptacle containing controlled substances; or

(f) imprint on or affix to any controlled substance a false or forged code number or symbol.

2. Possession of a false or forged prescription for a controlled substance by any person other than a pharmacist in the lawful pursuance of his profession shall be presumptive evidence of his intent to use the same for the purpose of illegally obtaining a controlled substance.

3. Any person who, in the course of treatment, is supplied with a controlled substance or a prescription therefore by one practitioner and who, without disclosing the fact, is supplied during such treatment with a controlled substance or a prescription therefor by another practitioner shall be guilty of a violation of this article.

Appendix E, Opinion, Application for Stay, October 28, 1975 (96 S. Ct. 164).

SUPREME COURT OF THE UNITED STATES

No. A-368

MR. JUSTICE MARSHALL, Circuit Justice.

This is an application for a stay of the judgment of a Three-judge court sitting in the Southern District of New York. The applicant, the Commissioner of Health of the State of New York, has been enjoined by the three-judge court from enforcing certain provisions of New York's Public Health Law (the Law). Respondents are various physicians, organizations of physicians, and patients in the State of New York who successfully brought suit to have those provisions declared unconstitutional.

The provisions at stake are those parts of §§ 3331 (6), 3332 (2)(a), and 3334 (4) of the Law that require the names and address of each patient receiving a Schedule II controlled substance to be reported to the applicant. Schedule II drugs are those that have a high potential for abuse, but also have an accepted medical use. They include opiates and amphetamines. Under the state law, a doctor prescribing a Schedule II drug does so on a special serially numbered triplicate prescription form. One copy is retained by the doctor, a second goes to the pharmacist (if applicable), and the last copy goes to the applicant, who transfers the data, including the name and address of the patient, from the prescription to a centralized computer file.

Respondents brought this action shortly after the effective date of the computerization program, alleging violations of their constitutional rights under 42 U. S. C. § 1983 and grounding jurisdiction on 28 U. S. C. § 1343 (3).

Specifically, respondents claimed that mandatory disclosure of the name of a patient receiving Schedule II drugs violated the patient's right of privacy and interfered with the doctor's right to prescribe treatment for his patient solely on the basis of medical considerations. A three-judge court was convened. *Roe* v. *Ingraham,* 480 F. 2d 102 (CA2 1973).

At trial, various respondents testified that they were inhibited from using or prescribing Schedule II drugs they otherwise found beneficial because of a reluctance to disclose their or their patients' identities to the State. While questioning respondents' standing to sue, the State asserted that knowledge of patients' names was necessary to enable the computer system to detect drug abuse. When put to its proof by respondents, however, the State eventually conceded that the names and addresses of patients were useful in detecting only one abuse: patients who go from doctor to doctor (using the same name on each visit) in order to obtain an excess supply of drugs. Thereupon respondents showed that in 15 months of operation the computer had located only one suspected "doctor-shopper" while processing over 125,000 prescriptions per month. Thus respondents contended that the centralization of patients' names and addresses served no compelling state interest sufficient to offset the asserted invasion of privacy.

The three-judge court accepted respondents' arguments. The court read our decisions in *Roe* v. *Wade,* 410 U. S. 113 (1973), and *Doe* v. *Bolton,* 410 U. S. 179 (1973), as placing the doctor-patient relationship among those zones of privacy accorded constitutional protection. While noting that *Roe* and *Doe* concerned the most intimate of personal relations, sexual intimacy and the decision to bear a child, the court refused to hold the doctor-patient relationship constitutionally protected only when matters of childbearing were at stake. Rather, it noted the intimate nature

of a patient's concern about his bodily ills and the medication he takes, and held that these matters too are protected by the constitutional right to privacy. While reaching this conclusion primarily on the basis of *Roe* and *Doe,* the court drew some support from the concurring and dissenting opinions in *California Bankers Assn.* v. *Shultz,* 416 U. S. 21, 78, 79, 91 93 (1974), which it read as indicating that a majority of this Court would accord constitutional protection, at least against a wholesale reporting requirement, to all "intimate areas of an individual's personal affairs." *Id.,* at 78 (POWELL, J., concurring). Upon finding that respondents had a protected privacy interest in the medication they received, the court balanced that interest against the State's need for patient names, and concluded that, with one suspect uncovered over 15 months, the need shown was ephemeral. "The diminution of a constitutionally guaranteed freedom is too great a price to pay for such a small governmental yield." *Roe* v. *Ingraham,* slip op., at 16 (footnote omitted).

Finding those portions of the Law that demanded disclosure of patients' names and addresses to the State to be unconstitutional on the facts, the court enjoined the State from enforcing those provisions and from accepting for filing prescriptions or other documents disclosing the identities of patients receiving Schedule II drugs. The court also ordered the destruction of any name-bearing prescription forms in the State's possession and the expungement of names from all computer records. The court stayed the destruction and expungement order pending disposition of the case by this Court; it refused, however, to stay its declaration of unconstitutionality and its injunction against enforcement of the provisions and acceptance of incoming prescriptions.

Thus the application for stay now before me concerns only those matters the District Court refused to stay. The principles that govern a Circuit Justice's in-chambers review of stay applications are well known. A single

Justice will grant a stay only in extraordinary circumstances. Certainly the judgment of the lower court, which has considered the mater at length and close at hand, and has found against the applicant both on the merits and on the need for a stay, is presumptively correct. To prevail here the applicant must meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal.

MR. JUSTICE POWELL has succinctly stated the considerations pertinent to evaluating these two factors:

> "As a threshold consideration, Justices of this Court have consistently required that there be a reasonable probability that four members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. See *Mahan* v. *Howell,* 404 U. S. 1201, 1202; *Organized Village of Kake* v. *Egan,* 80 S. Ct. 33, 4 L. Ed. 2d 34 (1959). Of equal importance in cases presented on direct appeal—where we lack the discretionary power to refuse to decide the merits—is the related question whether five Justices are likely to conclude that the case was erronueously decided below. Justices have also weighed heavily the fact that the lower court refused to stay its order pending appeal, indicating that it was not sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim." *Grames* v. *Barnes,* 405 U .S. 1201, 1203-1204 (1972) (POWELL, J., in chambers).

See also *Aberdeen & Rockfish R. Co.* v. *SCRAP,* 409 U. S. 1207, 1218 (1972) (BURGER, C. J., in chambers); *Railway Express Agency* v. *United States,* 82 S. Ct. 466, 7 L. Ed. 432 (1962) (Harlan, J., in chambers); *United Fuel Gas Co.* v. *Public Service Comm'n,* 278 U. S. 322, 326 (1929).

Applying these standards to the application before me, I conclude a stay should not be granted. The three-judge court gave careful consideration to applicant's motion for a stay and, indeed, granted one insofar as it deemed necessary to prevent irreparable harm to applicant's interests. Applicant has shown nothing to persuade me the lower court erred. If applicant's position is sustained on appeal, all the data it is precluded from processing by the District Court's order will be readily available from the State's doctors and pharmacists, who are required by law to retain the complete prescription form for five years. The information now denied the State's computers can thus be located and tabulated at a later date. While the State may suffer delay in the complete implementation of its computerization program, delay alone is not, on these facts, irreparable injury.

I conclude that applicant would suffer no irreparable injury if a stay is denied. This conclusion necessarily decides the application and renders unnecessary consideration of the possibility, since this case involves an appeal as of right, that applicant will be able to convince five Justices to reverse the three-judge court. I do note, however, that the right to privacy is a sensitive and developing area of the law and that the three-judge court did not apply it in a manner plainly inconsistent with our decisions. Likewise, the court's conclusion that respondents had standing seems in accord with the liberal standing decisions of this Court. Of course, this conclusion and my denial of a stay on the papers now before me is not to be taken as a reflection of my views on the merits of this case, or as an indication of the ultimate disposition of the case in this Court.

The application is denied.